7-1200-16780-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT

In the Matter of Proposed Amendments to Rules Governing Vocational Rehabilitation, Minn. R. pts. 3300.5010 to 3300.5060.	**REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for review by the Chief Administrative Law Judge pursuant to the provisions of Minnesota Rules, part 1400.2240, subpart 4. Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge, dated December 14, 2005, in all respects.

In order to corrects the defects enumerated by the Administrative Law Judge in the attached Report, the agency shall either take the action recommended by the Administrative Law Judge, make different changes to the rule to address the defects noted, or submit the rule to the Legislative Coordinating Commission and the House of Representatives and S0enate policy committees with primary jurisdiction over state governmental operations, for review under Minnesota Statutes, section 14.15, subdivision 4.

If the agency chooses to take the action recommended by the Administrative Law Judge, or if the agency chooses to make other changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the State Register, the agency's order adopting the rules, and the rule showing the agency's changes. The Chief Administrative Law Judge will then make a determination as to whether the defects have been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated this 20th day of December, 2005.

s/Raymond R. Krause
RAYMOND R. KRAUSE
Chief Administrative Law Judge

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REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Richard C. Luis held a hearing concerning the above rules on October 17, 2005, at 9:00 a.m. in Room N110, First National Bank Building, 332 Minnesota Street, Saint Paul, Minnesota. The hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in their being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

The agency hearing panel, consisting of Connie Giles, Director of Vocational Rehabilitation and Workforce Systems Integration; Roberta Pisa, Director of Consumer and Staff Services; Kimberly Peck, Director of Rehabilitation Services; Heather Farmer, Rehabilitation Specialist; and Julie Leppink, Assistant Attorney General, were available to provide the public with information about the proposed rules and to answer any questions. Approximately 17 members of the public attended the hearing and signed the hearing register.

The Department of Employment and Economic Development ("Department" or "Agency") sent a packet of comments to the Administrative Law Judge prior to the hearing. After the hearing ended, the record remained open for 20 days, until November 7, 2005, to allow interested persons and the Agency an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five business days to allow the Agency the opportunity to file a written rebuttal to the ten comments submitted. The deadline for responses to the comments

[1] Minn. Stat. §§ 14.131 through 14.20. (Unless otherwise specified, all references to Minnesota Statutes are to the 2004 edition, and all references to Minnesota Rules are to the 2003 edition.)

was November 14, 2005. One responsive comment was received. The hearing record closed for all purposes on November 14, 2005.

NOTICE

The Commissioner must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4, and Minn. R. 1400.2240, subp. 4, this Report has been submitted to the Chief Administrative Law Judge for his review. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need and reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects, or if the Commissioner does not elect to adopt the suggested actions, the statute requires the proposed rules be submitted to the Legislative Coordinating Commission and to the House of Representative and the Senate policy committees with primary jurisdiction over state governmental operations for advice and comment.

If the Agency chooses to follow the Chief Judge's recommended corrections and makes the suggested changes and/or others in order to cure the defects found, the agency must resubmit the rules for review by the Chief Judge. The Agency may not adopt the rules until the Chief Judge reviews all changes and determines that all defects have been corrected.

If the Agency chooses to submit the rules to the Legislative Coordinating Commission and the legislative committees for review, the agency must wait at least 60 days after its submission before adopting the rules.

After the rules have been adopted, the Office of Administrative Hearings will file the rules with the Secretary of State. The Agency must give notice of the rules' filing to all persons who requested that they be informed.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On November 8, 2004, the Department published a Request for Comments on planned rule amendments governing vocational rehabilitation. The notice indicated that the Department was engaged in rulemaking on this topic and that the Department

did not contemplate appointing an advisory committee to comment on the possible rules. The request for comment was published in the *State Register.*[2]

2. On August 3, 2005, the Agency filed copies of the proposed Dual Notice, proposed rules, and draft SONAR with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2080, subp. 5. On the same date, the Agency also filed a proposed additional notice plan for its Dual Notice and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter of August 9, 2005, Administrative Law Judge Richard C. Luis approved the additional notice plan.

3. As required by Minn. Stat. § 14.131, the Department asked the Commissioner of Finance to evaluate the fiscal impacts and benefits of the proposed rules upon local units of government. The Department of Finance concluded that the rules would have little fiscal impact on local units of government.[3]

4. On August 24, 2005, the Department mailed the Dual Notice of Hearing to all persons and associations included in the additional notice plan.[4] To date, no individuals or associations have registered their names with the Department for the purpose of receiving notice of the Department's rulemaking efforts.[5] The Dual Notice contained the elements required by Minn. R. 1400.2080, subp. 2. Requests for a hearing had to be received by September 28, 2005. If the required 25 requests for hearing were received, a hearing would be held October 17, 2005, in St. Paul. The Dual Notice also announced that the hearing would continue until all interested persons had been heard.

5. On October 3, 2005, a Notice of Hearing was mailed to all persons who had requested a hearing.[6]

6. At the hearing on October 17, 2005, the Department filed the following documents as required by Minn. R. 1400.2220:

A. The Department's Request for Comments as published in the *State Register* on November 8, 2004.[7]

B. The proposed rules dated July 28, 2005, including the Revisor's approval;[8]

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[2] 29 S.R. 505 (November 8, 2004); Exhibit 3.

[3] The Department and its assigned representative of the Commissioner of Finance exchanged email communications regarding this requirement on or about November 3, 2004.

[4] Exhibit 1.

[5] Exhibit 12.

[6] Exhibit 13.

[7] Exhibit 3. The Certificate of Mailing the Request for Comments was submitted as Ex. 16. The written comments received in response to the Request for Comments was submitted as Ex. 4.

[8] Exhibit 5.

C. The Statement of Need and Reasonableness ("SONAR"),[9] and an Addendum to the SONAR;[10]

D. The certification that the Department mailed a copy of the SONAR to the Legislative Reference Library;[11]

E. The Dual Notice of Hearing as mailed and published in the *State Register* on August 29, 2005;[12]

F. Certificate of Mailing the Dual Notice of Hearing and Certificate of Mailing List;[13]

G. A copy of the transmittal letter sending a copy of the SONAR and other documents to Legislators on August 25, 2005;[14]

H. Written comments and requests for hearing received by the Department in response to the Dual Notice.[15]

I. Withdrawals of requests for hearing.[16]

J. Certificate of mailing the notice to those persons who requested a hearing, dated October 3, 2005, and the notice of hearing to those who requested a hearing, dated October 3, 2005.[17]

K. FFY 2005 Post Secondary Authorization Summary.[18]

L. FY 2006 Undergraduate Tuition and Fees for a Full Time Student.[19]

7. The Administrative Law Judge finds that the Department has met all of the procedural requirements under the applicable statutes and rules.

Background and Nature of the Proposed Rules

8. Vocational Rehabilitation ("VR") is a statewide program that assists persons with significant disabilities prepare for, secure, retain, or regain employment.

[9] Exhibit 6.
[10] Exhibit 7.
[11] Exhibit 8.
[12] Exhibit 9; and 30 S.R. 197 (August 29, 2005).
[13] Exhibits 1 (Certificate of Additional Notice) and 12 (Certificate of Accuracy of Mailing List).
[14] Exhibit 2.
[15] Exhibits 10 and 11.
[16] Exhibit 14.
[17] Exhibit 13.
[18] Exhibit 15.
[19] Exhibit 16.

Program participants are individuals who have disabilities that cause serious functional limitation in terms of employment in one or more important areas of life activity and who require multiple VR services over an extended period of time to achieve an employment outcome.

9. Services are provided by qualified vocational rehabilitation counselors out of the state's WorkForce Center System through a strong partnership of public and private providers. Services include such things as assessment, vocational evaluation, training, rehabilitation counseling, assistive technology and job placement.

10. The VR program is a state and federal partnership in which federal funds are obtained through a state/federal match. When resources do not allow VR to serve all persons with disabilities, federal regulations require that priority is given to persons with the most significant disabilities.

11. The Department concluded that the proposed amendments to existing rules covering vocational rehabilitation were warranted. The amendments include:

Lowering the gross family income threshold at which customers will be expected to pay part of certain vocational rehabilitation services;

Clarifying and revising the terms and conditions for when costs are covered, how services are provided, and what products and services can be provided to include:

determination of the amount the Agency will pay for individuals attending postsecondary training as part of an approved employment plan;

requiring an individual to apply gift aid that exceeds the amount needed for tuition and fees toward other school related expenses;

applying the tuition fee schedule to all private and out of state schools, including Gallaudet University and the National Technical Institute for the Deaf;

removing fee guidelines for the purchase of computers;

using the same rate that is paid by medical assistance when purchasing durable medical equipment;

setting standards for vendors of pre-driving and driving assessments and standards for vendors that provide vehicle adaptations;

requiring that the Agency consider public transit, including para-transit, prior to the Agency providing vehicle modifications;

lowering the amount the Agency will pay for vehicle repairs;

removing the stipulation that the Agency must not require an individual to accept a loan to start a small business.

Bringing rules into conformity with federal regulations (Title 34, Code of Federal Regulations, Part 361).

Statutory Authority

12. Minnesota Statutes, section 116J.035, subdivision 2, gives the Department's commissioner general rulemaking authority to "adopt rules pursuant to chapter 14 as necessary to carry out the commissioner's duties and responsibilities." Minnesota Statutes, section 268A.03(m), gives the commissioner program-specific authority to "adopt, amend, suspend, or repeal rules necessary to implement or make specific programs that the commissioner by sections 268A.01 to 268A.15 is empowered to administer." Minnesota Statutes, section 268A.03(b), authorizes the commissioner to administer the vocational rehabilitation program by providing VR services to persons with disabilities in accordance with the federal Rehabilitation Act of 1973, as amended.

13. The federal Department of Education Rehabilitation Services Administration provides policy guidance to state VR agencies, allocates federal funds to state agencies under the Rehabilitation Act, and monitors the performance of the VR program nationwide.

14. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules and rule amendments.

Rulemaking Legal Standards

15. Under Minnesota law,[20] one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[21] The Department prepared a Statement of Need and Reasonableness (SONAR)[22] in support of its proposed rules. At the hearing, the Department relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Agency staff at the public hearing, and by the Agency written post-hearing comments and reply.

16. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule

[20] Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

[21] *Mammenga v. DNR of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[22] Ex. 6.

with an arbitrary rule.[23] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[24] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[25] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[26]

17. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[27]

18. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether an agency has statutory authority to adopt the rule, whether the rule is unconstitutional or otherwise illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[28]

19. Minnesota law allows an agency to withdraw a proposed rule, or a portion of a rule, at any time prior to filing it with the Secretary of State,[29] "unless the withdrawal of a rule or a portion of the rule makes the remaining rules substantially different."[30]

20. The standards to determine whether changes to proposed rules published initially create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications to initially published proposals are substantially different, the administrative law judge is to consider whether "persons who will be

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[23] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

[24] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

[25] *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

[26] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

[27] *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

[28] Minn. R. 1400.2100.

[29] Minn. Stat. § 14.05, subd. 3.

[30] Minn. R. 1400.2240, subp. 8.

affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

Additional Notice Requirements

21. Minn. Stat. § 14.131 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or must explain why these efforts were not made. The Department made significant efforts to inform and involve interested and affected parties in this rulemaking. The following individuals and groups received notice of the proposed rule amendments from the Department:

a. Members of the State Rehabilitation Council

b. Members and staff of the Minnesota Commission Serving Deaf and Hard of Hearing People

c. Major advocacy groups in Minnesota for people with disabilities

d. *Access Press*, a monthly newsletter published for persons with disabilities and distributed through more than 200 locations statewide in Minnesota

e. The chairperson of the Minnesota Association of Financial Aid Administrators, which represents all financial aid officers in Minnesota public and private post-secondary institutions

f. Financial aid officers at private post-secondary training institutions in Minnesota that are registered or exempt from registration with the Minnesota Higher Education Services office

g. All persons on the discretionary rule notice list which Rehabilitation Services used for its previous vocational rehabilitation rulemaking; this list includes key disability advocacy groups and has been updated as new groups have been identified

h. Centers for Independent Living in Minnesota

i. Community Rehabilitation Programs in Minnesota

j. All persons who signed attendance registers at the public forum on the VR program held by the State Rehabilitation Advisory Council in August of 2004

k. Staff members of the Department of Human Services with responsibilities for services to populations of persons with disabilities also served by VR (for example, persons with mental illness, persons with developmental disabilities, persons with chemical dependency, persons who are deaf or hard of hearing)

l. Directors of grant projects funded by the Rehabilitation Services Branch to serve persons with serious mental illness

m. Major organizations serving persons with mental illness in Minnesota

n. The chairperson of each local workforce investment board

o. The chairperson of the Governor's Workforce Development Council

p. Vendors of adaptive driving equipment from whom Rehabilitation Services made purchases of at least $5,000 in the last full federal fiscal year

q. Driving evaluators from whom Rehabilitation Services made purchases of at least $5,000 in the last full federal fiscal year

r. A stratified random sample of 750 eligible individuals of the VR program.[31]

22. The Administrative Law Judge finds that the Department fulfilled its additional notice requirement.

Statutory Requirements for the SONAR

Cost and Alternative Assessments in the SONAR:

23. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

[31] This sample was drawn from subsets of eligible individuals in the VR information system database receiving post-secondary training at private post-secondary institutions, vehicle adaptations, transportation, and vehicle repairs. It also included eligible individuals who are not exempt from financial participation in the cost of services and recipients of Social Security benefits. Exhibit 6 (SONAR), page 6. *See also* Exhibit 7.

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule, including the portion of total costs that will be borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

24. Those who will be primarily affected by the proposed rule amendments are eligible individuals receiving post-secondary training at private and out of state school; eligible individuals receiving payment for transportation services; eligible individuals and their families whose gross family income is above 200 percent of the federal poverty guidelines; eligible individuals who require vehicle adaptations; vendors of driver evaluations for people with disabilities; vendors of adaptive driving equipment; eligible individuals who require durable medical equipment; and eligible individuals receiving benefits under Title II or Title XVI of the Social Security Act.[32]

25. With regard to the second factor, the Agency does not anticipate that it or any other agency will incur additional charges as a result of the implementation of the proposed rule, nor does the Agency anticipate that the rule will have any effect on state revenues.[33]

26. As to the third factor, the Agency has made an effort to assure that the proposed rules are as non-intrusive and inexpensive as possible. The Agency acknowledges that the issue of intrusiveness may be especially relevant to the proposed rules on consumer financial participation, because those rules require individuals to provide the Department with information about family income. The Agency asserts that the total number of persons who will be asked to provide income information to the VR program will actually decrease under the proposed rules.[34]

[32] SONAR, page 3.
[33] SONAR, page 4.
[34] SONAR, page 4.

27. The Agency defers its analysis of the fourth regulatory factor, a description of any alternative methods considered by the Agency for achieving the purpose of the proposed rules, to the sections of the SONAR addressing the need for and reasonableness of the proposed rules, specifically rule parts 3300.5010, subpart 44; 3300.5040, subpart 1a; 3300.5060, subparts 9 and 13.[35]

28. The Agency defers its analysis of the fifth regulatory factor, information about the probable costs of complying with the proposed rules, to the sections of the SONAR addressing the need for and reasonableness of the proposed rules, specifically rule parts 3300.5010, subpart 44; and 3300.5040, subpart 1a.[36]

29. The Agency defers its analysis of the sixth regulatory factor, information about the probable costs or consequences of not adopting the proposed rules, to the sections of the SONAR addressing the need for and reasonableness of the proposed rules, specifically rule parts 3300.5010, subpart 44; and 3300.5040, subpart 1a.[37]

30. The Department asserts that there are no differences between the proposed rule amendments and existing federal language.[38]

Performance-Based Regulation:

31. Minn. Stat. § 14.131, requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals."

32. The Department states that the rules as proposed are performance-based by standards outlined in the federal regulations.[39]

Consultation with the Commissioner of Finance:

33. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

34. The Agency consulted with its Department of Finance representative, Keith Bogut, via email on November 3, 2004. The Agency predicted that the proposed rules would have no fiscal impact on units of local government.

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[35] SONAR, pages 4, 18, 21-22, 34.
[36] SONAR, pages 4, 18, 21-22.
[37] SONAR, pages 5, 18, 21-22.
[38] SONAR, page 5.
[39] SONAR, page 5. *See* 34 C.F.R. §§ 368.82, 361.84 and 361.86.

35. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Analysis Under Minn. Stat. § 14.127

36. Effective July 1, 2005, under Minn. Stat. § 14.127, the Department must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[40] The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[41]

37. The Agency has determined that the cost of complying with the proposed rules in the first year after they take effect will not exceed $25,000 for any small business or small city.[42] The determination was included in the Agency's response to comments received November 7, 2005.

38. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.127 and approves the Agency's determination that the proposed rule, in the first year after the rule takes effect, will not exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.

39. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

40. The Administrative Law Judge finds that the Department has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

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[40] Minn. Stat. § 14.127, subd. 1 (2005).
[41] Minn. Stat. § 14.127, subd. 2 (2005).
[42] Ex. 28, p. 7.

Rule Part by Part Analysis

Minn. R. 3300.5010, subps. 4 and 49

41. The Department proposes to amend subpart 4 to clarify that "books and supplies for post secondary training" means "textbooks, paper, pencils, pens, small calculators, and similar items" that all students are required to purchase for participation in the particular program.[43] The current rule only designates items that are *usually* required. Similarly, the Department proposes to amend subpart 49 to clarify that "vocational training services" include tuition, materials, and fees that all students are required to purchase for participation in their training.[44] The current rule only designates tuition, fees, and materials that are *usually* required.

42. The Department seeks to make this clarification because it believes that the VR program should not be using limited public VR funds to pay for books and supplies, tuition, fees, and materials that are not required.[45] The Department argues that its proposed language removes the ambiguity from the current rule.

43. Bob Brick and Paula Goldberg of the Parent Advocacy Coalition for Educational Rights ("PACER") Center suggest that this proposed change will negatively affect students needing assistive technology devices because the VR program will only fund supplies that are needed by *all* students.

44. The Department explains that the proposed changes do not apply to assistive technology devices, which are defined in subpart 37. Accordingly, the proposed changes to subparts 4 and 49 do not affect students requiring assistive technology devices.

45. The ALJ concludes that the Department has demonstrated a rational basis for the proposed change. The amendment clarifies the current rule and is needed and reasonable.

Minn. R. 3300.5010, subp. 44

46. The Department has proposed a complete re-write of the tuition fee schedule because it has determined that it is not appropriate to continue to use limited public VR funds to pay for post-secondary training at private and out-of-state post-secondary institutions at the rate the VR program is currently using.[46]

47. The Department values and supports an individual's informed choice of post-secondary institution. By revising its tuition fee schedule, the VR program seeks to

[43] SONAR, page 8.
[44] SONAR, page 19.
[45] SONAR, pages 8 and 19.
[46] SONAR, page 14.

1) assure that eligible individuals have access to training at Minnesota public institutions; and 2) support informed choice, while assuring that public VR funds spent for tuition and fees to support an individual's choice to attend a private or out-of-state public institution do not exceed the amount that would be spent to support an individual's choice of a Minnesota public institution.[47]

48. The Department asserts that under the current rule, its VR expenditures for tuition and fees for VR eligible individuals attending private or non-Minnesota public post-secondary institutions are "substantially out of proportion to the number of VR eligible individuals attending such institutions."[48] Specifically, the VR program spent $2,537,110 for 1,635 individuals attending Minnesota public post-secondary institutions, while it spent $1,940,675 for 614 individuals attending private or non-Minnesota public post-secondary schools.[49]

49. The proposed rules provide that an individual seeking *undergraduate* training at private post-secondary institutions and non-Minnesota public post-secondary institutions *not* offering a baccalaureate degree, will be assisted in an amount determined by the average cost of full-time *resident* tuition at each of the technical and community colleges in the Minnesota State College and University ("MnSCU") system.[50]

50. For *undergraduate* training at private and non-Minnesota public post-secondary institutions offering a baccalaureate degree, the VR program is proposing a tuition fee schedule in an amount determined by the average cost of full-time undergraduate *resident* tuition at each of the state universities in the MnSCU system.[51]

51. According to the Department, almost all eligible individuals who require undergraduate post-secondary training to achieve their employment goals have the option of attending a Minnesota public post-secondary school.[52] The Department is quick to explain that in the rare instances where the undergraduate field of study needed for an individual's employment goal is not available at a Minnesota public institution, the tuition fee schedule provision of the rules does not apply.[53]

52. The proposed rules also change the tuition schedule for individuals seeking a *post-baccalaureate* degree at the University of Minnesota to limit the VR program contribution to the cost of full-time graduate *resident* tuition and mandatory student services fees at the Graduate School of the University of Minnesota-Twin Cities campus.[54] As for individuals attending private and non-Minnesota public institutions to obtain a *post-baccalaureate* degree, the VR proposes a fee schedule determined by

[47] SONAR, page 14.
[48] SONAR, page 13.
[49] SONAR, page 13.
[50] SONAR, page 14-15.
[51] SONAR, page 15.
[52] SONAR, page 14.
[53] SONAR, page 14. Transcript ("Tr.") 84-86.
[54] SONAR, page 16.

averaging the cost of full-time graduate *resident* tuition at each of the state universities in the MnSCU system.[55]

53. The existing rules in each of the four categories determine VR program contribution schedules by setting the limit at full-time tuition and fees for Minnesota public post-secondary institutions, regardless of the residency of the eligible individual. The existing rules also give the benefit of the highest tuition rate in the MnSCU system, rather than an average across MnSCU schools as proposed in the rule changes.

54. The proposed changes to this rule part generated a significant amount of comment from the public. Michael Wilhelmi of the Minnesota Private College Council objects to the proposed tuition fee schedule as unfairly singling out students attending private colleges for cuts in their VR assistance.[56] Mr. Wilhelmi contends that the type of institution, public or private, from which an individual receives his education services is not a legitimate concern of the VR program. Instead, the VR program should focus on its central purpose of "[assisting] Minnesotans with significant disabilities to prepare for, secure, retain or regain employment."

55. Mr. Wilhelmi and a number of other commentators, including the Minnesota Office of Higher Education and the PACER Center, disputed the Department's assertion that students at private colleges offering baccalaureate degrees are costing the state more money to educate. They each point out that, statistically, students at private institutions graduate more quickly from their programs of study than students at public colleges, which, in the long run, translates into less expense to the VR program.[57]

56. Furthermore, Mr. Wilhelmi and the Council do not agree that the Department's goal of fiscal management is a reasonable motive for making the proposed changes.[58] And the Council faults the Department for failing to provide any cost analysis as to how the Department will save and redirect VR funds to other eligible individuals.[59] Mr. Wilhelmi suggests that the Department calculate a reimbursement schedule based on the highest public college tuition rate and subject all students to that cap, and he suggests amended rule language to reflect the change.[60]

57. In the same vein, Susan Heegaard from the Minnesota Office of Higher Education objected to the Department's use, in the proposed fee schedule, of the average tuition of schools in the *MnSCU* system, rather than the tuition at the University of Minnesota.[61] She asserts that the University of Minnesota tuition is higher, and that tuition rates at private colleges are closer to tuition rates at the University of Minnesota than at MnSCU schools. Ms. Heegaard argues that students attending private schools

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[55] SONAR, page 16.
[56] Ex. 18.
[57] Exs. 18, 27, and 30.
[58] Tr. 77.
[59] Tr. 82-83.
[60] Exs. 31, 18.
[61] Ex. 27.

are being penalized with a lower fee schedule than students attending the University of Minnesota, where they are eligible for help up to the full amount of tuition.

58. Paula Goldberg and Bob Brick from the PACER Center allege that the proposed changes in the tuition fee schedule are designed specifically to discourage eligible individuals from pursuing post-secondary degrees through private and out-of-state schools.[62] They question the principles cited by the Department as supporting the proposed changes and believe that those principles are in direct conflict with the policy of the federal Rehabilitation Act, which focuses on individuals' right to pursue a meaningful career based on informed choice.

59. As stated above, the Department believes it is reasonable to support an individual's informed choice of post-secondary institution, but it also contends that it has the responsibility to use limited VR funds in a prudent manner.[63] Currently, the VR program provides on average over $900 more for a student attending a private school than those attending Minnesota public institutions.[64] The Department's intent is to align more closely the amount that students receive regardless of whether they choose a public or private school, and the Department anticipates that the proposed changes to the tuition fee schedule will bring greater equity to the distribution of VR benefits and also provide a cost savings to the program, which can then be used to serve more individuals. The Department maintains that it cannot perform a cost analysis of the proposed changes because each situation is too fact specific.

60. In response to the comments, the Department adds that public policy in Minnesota creates subsidies for public post-secondary institutions in setting the costs of tuition and fees, and states that it is reasonable that the VR program would have a preference for the programs that the state is already supporting.[65] The Department cites Minn. Stat. § 135A.01, regarding the funding policy for higher education in the state and the focus on high quality public post-secondary education.[66]

61. Overall, the Department believes that by setting the bench mark for all schools at the average cost of tuition at a public school in the MnSCU system, that it preserves the right of the individual to make thoughtful choices even if the VR program is not able to fund that choice fully.[67]

62. The ALJ concludes that the policy choice made by the Agency has a rational basis. There is no evidence in the record that students receiving VR assistance will be deprived of educational opportunity. While it may be that a lack of funds will result in a student's inability to attend certain schools without aid to compensate for a lesser benefit amount, it has not been shown that other aid is unavailable from the

[62] Ex. 30, pp. 5-6.
[63] SONAR, page 17.
[64] Ex. 28, p. 3.
[65] Ex. 28, p. 3.
[66] Ex. 28, p. 4.
[67] Ex. 28, p. 6.

college of choice or other sources, through grants or loans. The ALJ also notes the Department will not apply the tuition fee schedule provision if an eligible individual's undergraduate field of study needed for the individual's employment goal is not available at a Minnesota public institution.[68]

Minn. R. 3300.5020, subp. 1

63. The Department proposes to eliminate current language requiring the VR program to identify open priority categories in its state plan and hold public meetings on the plan prior to its adoption as provided by the Code of Federal Regulations, title 34, section 361.18, paragraph (a)(1).[69]

64. In fact, there is no requirement in the federal regulations that the state plan identify open priority categories. Accordingly, the Department seeks to correct the confusion generated by the current rule language. The Department states that it will continue to have required public meetings regarding changes in the state plan, but the Department seeks to clarify that a public hearing is *not* required for the VR program director to open or close a priority category.[70]

65. Representatives of the PACER Center suggest that the SONAR does not adequately explain why the Department is proposing to delete the language requiring public meetings on the state plan, and therefore, does not demonstrate that the proposed change is reasonable.[71]

66. The Department responded by citing to 34 CFR 361.20 (a) as follows:

> The State plan must assure that prior to the adoption of any substantive policies or procedures governing the provision of vocational rehabilitation services under the State plan, including making any substantive amendment to those policies and procedures, the designated State agency conducts public meetings throughout the state to provide the public, including individuals with disabilities, an opportunity to comment on the policies or procedures.

67. The ALJ agrees with the comments from the PACER Center that the SONAR is deficient in its explanation about why the Department seeks to eliminate the language regarding public meetings. However, by citing to 34 CFR 361.20 in its rebuttal comments, the Department makes clear that it is still required to have public meetings before making substantive changes to its VR policies and procedures, even if the proposed change is adopted. The Department is correct in clarifying that a public meeting is not required before the VR program director can *open or close* a priority category. An examination of the language of Code of Federal Regulations, title 34,

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[68] *See* Finding 51.

[69] SONAR, pages 19-20. The VR program submits its state plan to the federal Rehabilitation Services Administration.

[70] SONAR, page 19.

[71] Ex. 30, p. 6.

section 361.18, paragraph (a)(1) shows no mention of such a requirement. The ALJ finds that the Department demonstrated a rational basis for the proposed change.

Minn. R. 3300.5040, subp. 1a

68. This subpart addresses consumer financial participation (CFP), or the degree to which individuals eligible for VR funds must contribute to the cost of their own services. Federal regulations[72] authorize the Agency to consider the financial need of eligible individuals, and the Agency has determined that it is necessary to revise the level at which consumer financial participation in the cost of services will be required.[73] The Agency supports this change to ensure that individuals who can afford to pay for part or all of the cost of certain services do so, and that limited public funds are used to purchase services for persons who cannot afford to contribute, in whole or in part, to the cost of services.

69. Currently, the CFP threshold is the average of the Minnesota median income as adjusted for family size and 187.5% of the federal poverty level as adjusted for family size. The Department proposes to amend the CFP threshold to 200% of the federal poverty level only.

70. The Department considered four different options, and decided on the proposed change based, in part, on advice from the State Rehabilitation Advisory Council.[74] Upon examination of the current rule, the Department received input from VR staff that eligible individuals with gross family incomes at the current CFP thresholds did, in fact, have income sufficient to allow them to pay at least part of the cost of services. According to the VR program, the median income in Minnesota has risen sharply since the original rules were adopted and is among the highest in the nation.[75]

71. The Department acknowledges that under the proposed rule some individuals who previously did not have to pay part of the cost of services will now have to pay part of the cost, and the percentage paid by eligible individuals who currently pay part of the cost of services will increase. For example, under the current rules, a family of two does not participate financially in the cost of services until the annual family income is $38,117. Under the proposed rules, that same family of two begins financial participation in the cost of services when the annual family income reaches $25,660.[76] Presently, 9.2% of individuals eligible for VR funds under an employment plan are required to make any financial participation in the cost of services.[77] A random sample

[72] 34 CFR § 361.54 (b)(1).
[73] SONAR, page 20.
[74] SONAR, page 22.
[75] SONAR, page 22.
[76] SONAR, page 21.
[77] SONAR, page 22.

of eligible individuals who currently have no CFP under the current rule shows that the percentage could increase to approximately 18% under the proposed rule.[78]

72. A number of commentators objected to the proposed CFP threshold, arguing that 34 C.F.R. 361.54 (b)(iv) requires that the CFP threshold be based on economic need.[79] Representatives from the PACER Center argue that the Department's proposed change may cause economic hardship to persons with disabilities and effectively deny individuals the right to a necessary service, especially those on Medical Assistance.[80] Justin Page from the Client Assistance Project of the Minnesota Disability Law Center contends that the Department's SONAR does not adequately explain how this proposed change is reasonable.[81] Mary Hartnett from the Minnesota Commission Serving Deaf and Hard of Hearing People pointed to specific costs incurred by deaf and hard of hearing people that cannot be considered when determining eligibility for grants and services.[82] She states that those additional costs make the proposed rule change even more financially burdensome for the deaf population.

73. The Department agrees that the federal regulations require the CFP threshold to be based on economic need, but they argue that the state is given the discretion to establish the method for determining need.[83] Furthermore, the Department cites examples of five other state public programs using sliding scales based upon some multiple of the federal poverty level (100%, 150%, 175%, and 187.5%), and argues that the VR program's proposed threshold of 200% of the federal poverty level is reasonable in comparison.[84] The Department points out that under the current rule the CFP threshold is roughly equivalent to 300% of the federal poverty level, which is reasonable compared to other state programs. The Department also notes that many services are not subject to CFP, meaning the individual receives those services without having to pay anything, regardless of the family's income.[85]

74. Finally, the Agency replied to Mr. Page's and Ms. Hartnett's comments and stated that those individuals receiving Medical Assistance are exempt from participation in the payment of the VR services they are receiving.[86] In addition, the rules contain a

[78] SONAR, page 23.
[79] Tr. 32-33; Ex. 30.
[80] Ex. 30; Tr. 63-64.
[81] Tr. 33-35.
[82] Ex. 25.
[83] Ex. 28, p. 1.
[84] Ex. 28, p. 1.
[85] Ex. 28, p. 2. Examples of services not subject to CFP include, but are not limited to: assessment for determining eligibility and priority for services; assessment for determining VR needs; vocational evaluation; referral services; on-the-job training; and independent living skills training that supports an employment goal.
[86] Ex. 32, pp. 3-4.

variance provision for expenses associated with individual disability-related circumstances; this provision is not proposed to change in this rulemaking.[87]

75. The ALJ concludes that the Department has demonstrated a rational basis for the proposed change. It is within the discretion of the Department to redirect limited public funds by amending the CFP threshold as proposed above.

Minn. R. 3300.5060, subp. 3a

76. The Department seeks to add the following language to this subpart as item C: "The agency's expenditures for durable medical equipment must not exceed the amount paid by the Minnesota medical assistance program."

77. This proposed change is the VR program's attempt to institute appropriate cost control measures.[88] The Department believes that the VR program should not pay more for durable medical equipment than the state's Medical Assistance program, which is currently 80% of the retail price.

78. Joan Willshire of the Minnesota State Council on Disability expressed concern that the proposed cap on durable medical equipment will likely affect people with very low incomes and high medical needs.[89] She suggests that the proposed 20% co-pay will likely be unaffordable for a portion of people receiving VR services.

79. The Department responded to Ms. Willshire's comment by explaining that VR participants will not be asked to incur the remaining 20% of the equipment cost.[90] It notes that providers of durable medical equipment write off the costs exceeding medical assistance payment rates.

80. The ALJ concludes that the Department has demonstrated a rational basis for the proposed rule change. It is within the discretion of the Department to amend its expenditure cap on durable medical equipment to reflect the cap imposed by Minnesota Medical Assistance.

Minn. R. 3300.5060, subp. 9.C(4)
Minn. R. 3300.5060, subp. 12.J(4)

81. The Agency proposes to add the following language to subpart 9, item C regarding rehabilitation technology: "the agency must only purchase vehicle adaptations for a vehicle that is owned by the eligible individual." Similarly, the Agency proposes to add language to subpart 12, item J as follows: "the agency will only pay for repairs when the vehicle is owned by the eligible individual." The VR program believes that ownership is a reasonable way to ensure that an eligible individual will have access

[87] Ex. 28, p. 2.
[88] SONAR, page 27.
[89] Ex. 29.
[90] Ex. 32, p. 4.

to the vehicle needed to achieve his/her employment goals.[91] The Agency hopes to avoid investing limited financial resources into a vehicle to which the individual may not have predictable access, which could interfere with the individual's ability to achieve his/her employment goal.

82. Joan Willshire of the Minnesota State Council on Disability objects to the proposed change as discriminatory against disabled people with the most significant impairments, as they are the most economically challenged and the least likely to own a vehicle.[92] Ms. Willshire suggests that many people with disabilities rely on and need access to vehicles they don't own to have access to transportation. She proposes instead that the VR program pay for repairs to vehicles when eligible individuals can demonstrate that the vehicle is their primary source of transportation and/or is their source of transportation for education purposes.[93]

83. Representatives of the PACER Center echo Ms. Willshire's objections to the proposed rule and add that the proposed changes have the impact of limiting access to employment and community participation in direct conflict with the mission of the VR program.[94]

84. In response to these comments, the Department reiterated its initial arguments and called the proposed rule a "prudent" change.[95]

85. The ALJ concludes that the Department has the discretion to make policy choices in the form of the proposed change by redirecting limited public funds and has demonstrated a rational basis for doing so. The proposed changes in these subparts are found to be necessary and reasonable.

Minn. R. 3300.5060, subp. 9.C(5)

86. The Agency proposes to add the following language to subpart 9, item C: "the agency will contribute no more than the amount necessary for the least costly alternative for the [vehicle] adaptations." The VR program is aware that vehicle adaptation expenditures are the most expensive per individual expenditure that the program offers. To illustrate, in fiscal year 2004, the VR program spent 4.2% of its total expenditures on .005% of the total number of eligible individuals receiving purchased services.[96] The Agency contends that it is reasonable to consider the least costly alternative to ensure that resources are utilized in a fiscally responsible manner but at the same time ensure that individual needs are met.

[91] SONAR, page 29.
[92] Ex. 19.
[93] Ex. 19.
[94] Ex. 30, p. 7.
[95] Ex. 32, pp. 4-5.
[96] SONAR, page 29.

87. Joan Willshire of the Minnesota State Council on Disability objected to this proposed language as vague and potentially damaging to the disability community.[97]

88. The Agency did not submit a responsive comment on this issue.

89. The ALJ concludes that the language "least costly alternative" is vague and results in a defect in the rule. "Least costly alternative" is not defined in the rules, and this vague language gives the Agency overly broad discretion in making determinations about how much the VR program will contribute to vehicle adaptations. The ALJ proposes the following language to correct the defect in this rule subpart: "the agency will contribute no more than the amount necessary for the least costly ~~alternative for the~~ vehicle adaptations that will meet the safety needs of the individual." If the Department's concern is something other than safety, such as facilitating mechanical ability to operate the vehicle, then that reason should be stated. The language should also reference who determines the amount necessary for the "least costly alternative." Modifications of the proposed rule language to that effect would not result in a rule that is substantially different than the rules as published in the State Register because the rule proposal published in the State Register raised the general subject matter of cost control over vehicle adaptations.

Minn. R. 3300.5060, subp. 9.C(6)

90. The Agency proposes to amend subpart 9, item C to take into account the availability of public transportation, including paratransit, when assessing and determining an individual's transportation needs relative to the desired vocational outcome.[98] The Agency suggests that it is not fiscally prudent for the VR program to provide costly vehicle adaptations if it is clear that public transportation will allow individuals to achieve their goals. Currently, the rule mandates that the Agency must *not* consider the availability of public transportation when deciding whether to make vehicle adaptations.

91. The Minnesota State Council on Disability, the PACER Center, and the Center for Independent Living object to this rule amendment as ignoring some basic realities in the lives of people with disabilities and, as a result, limits their independence.[99] Specifically, the comments focus on the unreliability of paratransit providers and the frequently changing class schedules of those being served. For those reasons, the two organizations argue that public transportation is not a viable option for disabled individuals and that the proposed amendment is not reasonable.

92. The Department responds by pointing out that paratransit options are by definition "accessible", and that the VR program should not be required to "make up" for the limitations of these types of service providers.[100] The Department stresses that the

[97] Ex. 29; Tr. 88.
[98] SONAR, page 29.
[99] Exs. 29 and 30; Tr. 95-97.
[100] Ex. 32, p. 5.

VR program will continue to provide vehicle modifications when public transportation is not available.

93. The ALJ concludes that the Department has the discretion to make policy choices in the form of the proposed change and has demonstrated a rational basis, namely fiscal responsibility, for doing so.

Minn. R. 3300.5060, subp. 12.H

94. The Department proposes to add the following language to subpart 12 regarding transportation services: "The agency must limit transportation payments in support of postsecondary training to the amount that would apply if the eligible individual attended the Minnesota public institution closest to the eligible individual's residence which offers the broad field of study required by the employment plan." The proposed rule limits vocational rehabilitation payments for mileage and parking costs.[101] As with many of the proposed changes above, the Department bases its logic and rationale on the need for "prudent use of scarce public resources."

95. The Minnesota State Council on Disability and the PACER Center question this amendment to the rule. The Council on Disability suggests that transportation money should instead be based on the content of the course the person is taking. In other words, if an individual needs a course that is not offered at the closest public institution, the Agency should continue to pay the individual's full transportation expenses to the institution that offers the needed course.[102] In addition, the PACER Center asserts that the new language does not reflect the principles of informed choice, self-determination, and equal access from the federal Rehabilitation Act.[103] PACER representatives assert that the VR program is ignoring the many factors that are considered by individuals when they select a post-secondary institution, such as closeness to home, physical accessibility of the campus, expertise of disability support staff services, and the school's general attitude toward people with disabilities.

96. The Agency agrees with the factors cited by the PACER Center, but argues that other factors are also considered by individuals when selecting a college or school, such as location, cost, and level of financial support available.[104] The Agency acknowledged the suggestion from the Council on Disability, but expressed confusion at the use of the term "course" as it relates to "broad field of study."[105]

97. The ALJ concludes that Agency has the discretion to make the policy changes reflected in the proposed rule and has demonstrated a rational basis, namely fiscal responsibility, for the change.

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[101] SONAR, page 30.
[102] Ex. 19 and 29.
[103] Ex. 30, p. 7.
[104] Ex. 32, p. 5.
[105] Ex. 32, p. 6.

Minn. R. 3300.5060, subp. 13.F

98. The Agency proposes to apply the tuition fee schedule to eligible individuals attending Gallaudet University in Washington D.C., the National Technical Institute for the Deaf (NTID) in New York, or a post-secondary training program operated by a community rehabilitation program in conjunction with a Minnesota public post-secondary training institution.

99. Currently, the tuition fee schedule does not apply to individuals attending these institutions because the schools include the costs associated with interpreting into their tuition and fees.[106] In FFY 2004, the VR program provided funding for 38 deaf students attending Gallaudet and NTID; the average expenditure for those students was $4,575.[107] By comparison, the VR program provided funding for 73 deaf students attending Minnesota public institutions; the average expenditure for those students was $1,346.

100. The Agency advocates the proposed change because under the Americans with Disabilities Act and the Minnesota Human Rights Act, schools have now assumed the responsibility to provide interpreters to students requiring this service. Therefore, the Agency states that it is unnecessary for the VR program to maintain the current exception to the tuition fee schedule.[108]

101. Several members of the public spoke in support of Gallaudet University and the education it provides to people with disabilities. Mike Cashman of Communication Services for the Deaf contends that any reduction in funding under the proposed rule would make attendance at Gallaudet impossible for many deaf people.[109]

102. Joan Willshire of the Minnesota State Council on Disability and Mary Hartnett from the Minnesota Commission Serving Deaf and Hard of Hearing People argue that institutions like Gallaudet and NTID provide an increased level of access for people with disabilities.[110] They suggest that specialized institutions like Gallaudet and NTID provide increased benefits for people with disabilities that make funding them a cost-effective option. Ms. Hartnett emphasizes the higher quality of education for deaf students who attend Gallaudet or NTID because they can communicate directly with other students and teachers.[111] Finally, both organizations urged the Agency to consider the importance of giving meaningful choices and providing full access for people with disabilities in addition to cost minimization.

103. Mary Hartnett questioned why the Agency is seeking a reduction in the funding it provides to eligible individuals when the federal Social Security Administration

[106] SONAR, page 32.
[107] SONAR, page 32.
[108] SONAR, page 32.
[109] Ex. 17. Tr. 25-29. *See also* Tr. 35-36, 39-42.
[110] Ex. 19.
[111] Ex. 25.

reimburses the state for education costs expended on deaf individuals once those individuals become employed full-time and go off Social Security Disability Income (SSDI) or Supplemental Security Income (SSI).[112] For the state to be reimbursed, the individuals receiving SSDI or SSI must achieve the income level referred to as substantial gainful employment and must maintain the job throughout a nine month "trial work period."

104. The Agency reviewed its data from fiscal year 2001 to 2004 to address Ms. Hartnett's position.[113] According to the Agency, the files of 25 deaf individuals were closed successfully during that period who had attended Gallaudet or NTID at a cost to the VR program of $338,719. The Agency received reimbursement for only 12 of those individuals. The remainder of the individuals either did not achieve substantial gainful employment or were never on Social Security benefits. Furthermore, some of the students who attend Gallaudet or NTID do not return to Minnesota or do not tell the Agency where they are working, making it impossible for the Agency to claim reimbursement.[114]

105. The Agency also reviewed its data to determine whether it reflects Ms. Willshire's suggestion that specialized institutions like Gallaudet and NTID produce alumni with better employment outcomes than individuals who attend Minnesota public institutions.[115] According to the Agency, the outcomes are not significantly different and do not justify supporting individuals attending Gallaudet or NTID at a higher rate than students attending Minnesota public institutions.

106. The ALJ concludes that Agency has the discretion to make the policy changes reflected in the proposed rule and has demonstrated a rational basis for the change. Even though the new language limits the funding of eligible individuals who attend Gallaudet or NTID, it does not eliminate the institutions as choices. Students at these schools requiring more aid due to diminished VR assistance can apply for appropriate grants or loans from the schools or other sources.[116]

General Objection to this Rulemaking

107. Bob Brick and Paula Goldberg of the PACER Center question the timing of the proposed changes, in general, due to Congress' consideration of changes to the federal Rehabilitation Act in conjunction with reauthorization of the Workforce Investment Act of 1998 ("WIA").[117] Mr. Brick and Ms. Goldberg suggest that the

[112] Tr. 46-48.
[113] Ex. 28, p. 6.
[114] Ex. 28, p. 6.
[115] Ex. 28, pp. 6-7.
[116] *See* Finding 62.
[117] Ex. 30, p. 2.

proposed rules appear to be a strategy to deal with Agency fiscal concerns rather than to respond to any recent changes in the federal-level program requirements.[118]

108. Furthermore, Mr. Brick and Ms. Goldberg question whether it is reasonable for the Agency to "move forward with the proposed rule changes for the purpose of saving an undetermined amount of funding so it can be redirected to prevent an undetermined amount of individuals receiving VR services from being cut from an undetermined set of services."[119]

109. Finally, Mr. Brick and Ms. Goldberg express concern over the Agency's proposal to incorporate the federal regulations by reference throughout the rules instead of providing the exact language.[120] They feel that this approach allows automatic changes to the rules without the benefit of analysis and public debate about whether the federal language makes sense for Minnesota. Mr. Brick and Ms. Goldberg suggest strongly that if the Agency pursues the proposed rule changes, that it substitute all citations to the federal regulations with the specific language it desires.

110. The Agency has indicated that is has followed the WIA legislation and has heard of no proposed changes to the Rehabilitation Act.[121] The Agency does not believe it is reasonable to wait for federal legislation to pass, and seeks to incorporate by reference the language of the federal statutes and regulations so that the rule remains in compliance with the regulations when the statutes and regulations change. The Agency notes that the federal level requirements that are being incorporated by reference are all definitions, and that the Agency does not have discretion to change the definitions or to reject the language of the federal statutes and regulations.[122]

111. The ALJ concludes that the Agency is acting within its discretion generally throughout this rulemaking.

Post-Publication Modifications to the Rules

112. The Department seeks to make a non-controversial change throughout the text of the rules. Since the drafting of the rule language, the Department has learned that the Higher Education Services Office ("HESO") has changed its name to the Office of Higher Education.[123] The Department proposes to amend the rule language to make that correction.

113. The modification noted in the preceding finding is necessary so that the rules are accurate and updated. It is found to be necessary and reasonable. This

[118] Ex. 30, pp. 1-2.
[119] Ex. 30, p. 3.
[120] Ex. 30, p. 4.
[121] Ex. 32, p. 7.
[122] Ex. 32, p. 8.
[123] Ex. 28, p. 7.

modification of the proposed rule is a clerical change that does not result in a substantially different rule from the proposed rules as published in the State Register.

114. As noted by the ALJ, the Department also seeks to make a modification to the new language of part 3300.5010, subp. 35, item D as follows: "gather information and identify support services, if needed, to assist an eligible individual to exercise informed choice."

115. The modification noted in the preceding finding is necessary so that the rules are grammatically correct. It is found to be necessary and reasonable. This modification of the proposed rule is a clerical change that does not result in a substantially different rule from the proposed rules as published in the State Register.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Employment and Economic Development gave proper notice in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii), except as noted at Finding 89.

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2; and 14.50 (iii).

5. The modifications to the proposed rules do not result in substantially different rules than were published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3; Minn. R. 1400.1000, subp. 1; and Minn. R. 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defect cited in Conclusion 3, as noted at Finding 89.

7. Due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subds. 3 or 4.

8. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

9. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules be adopted as modified, except where otherwise noted.

Dated this 14th day of December, 2005.

s/Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

Recorded: Transcribed. Paradigm Reporting and Captioning (one volume).